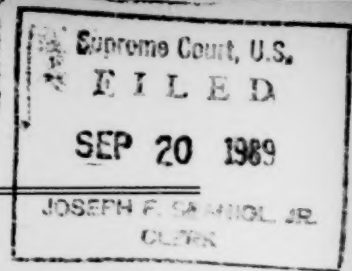


(2)
No. 89-326



In The
Supreme Court of the United States
October Term, 1989

DORMAN O. YOUNG d/b/a TIFFANY's,
Petitioner,
vs.

MT. HAWLEY INSURANCE COMPANY and
ST. KATHERINE INSURANCE COMPANY, PLC,
Respondents.

On The Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

WHETHER JURISDICTION FOR WRIT OF CERTIORARI IS PROPER UNDER 28 U.S.C. SECTION 1254(1).

II.

WHETHER THE UNITED STATES COURT OF APPEALS WAS CORRECT IN AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

LIST OF PARTIES

Petitioner is Dorman O. Young. He is an individual residing in Hot Springs, Garland County, Arkansas. Petitioner and Joe Noga were named insureds on a policy of insurance issued by the Respondents in the names of Dorman Young and Joe Noga d/b/a Tiffany's and further naming W.R.M., Inc., as the Mortgagee.

Respondents are foreign corporations authorized to do business in the State of Arkansas, namely, Mt. Hawley Insurance Company, a Delaware Corporation, and St. Katherine Insurance Company, P.L.C., a Corporation of London, England.

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Mt. Hawley Insurance Company and St. Katherine Insurance Company, PLC, respectfully request that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The pertinent opinions below are included in the Petitioner's Appendix. The Opinion of the United States Court of Appeals for the Eighth Circuit, affirming the District Court, is also included in the Petitioner's Appendix, Pages A1 and A2.

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on April 25, 1989. A Petition for Rehearing was denied on May 30, 1989.

JURISDICTION

Petitioner alleges jurisdiction of the United States Supreme Court under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Ark. Code Ann. Section 23-79-104, provides that no contract of insurance of property or of any interest in property or arising from property shall be enforceable as to the insurance except for the benefit of persons having an insurable interest in the things insured at the time of the effectuation of the insurance and at the time of the loss.

Additionally, the provision defines "insurable interest" as any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, pecuniary damage or impairment.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari should be denied because this matter does not involve a question of gravity and general importance, there being no conflict between decisions of State and Federal Courts, or between those Federal Courts of different circuits, and does not affect international relations. Additionally, Petitioner seeks a Writ of Certiorari to review the evidence, discuss specific facts and to review the decision of the United States Court of Appeals for the Eighth Circuit, based solely on questions of fact. Petitioner seeks review of the Court of Appeals for the Eighth Circuit's Opinion affirming the denial of Petitioner's Post-Trial Motion for Judgment Notwithstanding the Verdict. A request for such relief lies within the sound discretion of the trial court and the Court of Appeal's opinion that the District Court did not abuse its discretion by denying relief to the Petitioner should not be disturbed.

STATEMENT OF THE CASE

This is a civil action filed in the United States District Court, Western District of Arkansas, Hot Springs Division, with federal jurisdiction based on 28 U.S.C. Section 1332, on the complete diversity of citizenship of the parties and amounts in controversy in excess of \$10,000. Respondents issued a policy of insurance in the names of Dorman Young and Joe Noga d/b/a Tiffany's and further named WRM, Inc., as the Mortgagee. The insurance policy covered a business known as Tiffany's Restaurant in

Hot Springs, Arkansas, that was totally destroyed by fire on May 29, 1986.

Pursuant to the terms and conditions of the policy of insurance, Respondents paid the mortgagee, WRM, Inc., the balance of the mortgage and denied Petitioner's claim for proceeds under the policy, pleading affirmatively that the fire was intentionally set by or at the direction of the named insureds, Dorman Young and/or Joe Noga, and also pleading misrepresentation.

The Petitioner, Dorman Young d/b/a Tiffany's, filed suit against the Respondents for the proceeds due under the policy of insurance, claiming that he was entitled to the full proceeds due under the policy of insurance. Pursuant to an Order of the trial court, Joe Noga was made an indispensable party to the litigation as his name appeared on the policy of insurance as a named insured and he had an insurable interest. Ark. Code Ann. Section 23-79-104. At the trial, the jury was requested to determine the damages sustained by Dorman Young *only*.

The Petitioner, Dorman Young, was awarded a jury verdict of \$102,000, and on August 18, 1988, the District Court entered judgment on the jury verdict. Petitioner filed a Motion for Judgment Notwithstanding the Verdict to increase the jury award. The District Court denied the Motion and Petitioner filed an appeal from the denial of same. On April 25, 1989, the United States Court of Appeals for the Eighth Circuit issued an Opinion affirming the District Court's entry of judgment on the jury verdict and denying the Petitioner's Motion for Judgment Notwithstanding the Verdict. Petitioner's Petition for Rehearing was denied on May 30, 1989.

ARGUMENT

Petitioner has now filed a Petition for Writ of Certiorari before this Court, alleging that the United States Court of Appeals for the Eighth Circuit erred in its decision in upholding the trial court's denial of Petitioner's Motion for Judgment Notwithstanding the Verdict. At trial, there was substantial evidence presented as to the business relationship between Petitioner and Joe Noga. This testimony included the evidence of partnership, financial investment, financial contributions made during the course of the business relationship, and Petitioner's and Mr. Noga's contribution in terms of man hours and cash in the operation of the business, and as to the amounts of money which Petitioner has personally invested in the business, including monies personally loaned by Joe Noga to the Petitioner. At the trial of this matter, both Petitioner and Respondents presented evidence as to the value of the business contents and as to contributions made to the business by the named insureds. Both Petitioner and Mr. Noga were named insureds on the policy of insurance and had an "insurable interest" in the subject property as that term is defined in Ark. Code Ann. Section 23-79-104.

Further, following the jury trial of this matter, Interrogatory No. 4 was returned in favor of the Petitioner in the amount of \$102,000. The applicable verdict form submitted, without objection from counsel for Petitioner, stated as follows:

"Interrogatory No. 4 - If you should find in favor of the Plaintiff, Dorman Young, on the insurance policy, state the amount of damages,

if any, which you find were sustained by Dorman Young as a result of the occurrence."

A line was provided with a dollar sign (\$) and a signature line was also present for the foreman's signature. No objections were raised by counsel for Petitioner as to the instructions or as to the proposed Verdict Form at any time during the course of the trial or after the jury had returned its verdict. Additionally, counsel for Petitioner made no request to poll the jury when the verdict was returned nor was the issue of an inconsistent verdict ever raised by counsel for Petitioner. Accordingly, the judgment entered in this case allowed a recovery only on behalf of Petitioner, Dorman Young. Interrogatory No. 4, the damages interrogatory, requested that the jury return damages for Dorman Young only.

Petitioner seeks to have this Court review the denial of Judgment Notwithstanding the Verdict by alleging that its Motion for Directed Verdict should have been granted. The only question raised on appeal was whether there was substantial evidence to support the verdict of the jury.

In determining whether the trial court erred in denying a Motion for Judgment Notwithstanding the Verdict, the Court does not pass on the credibility of the witnesses nor weigh the evidence to determine whether the preponderance of the evidence is supported by the jury's findings. The Court is to consider only that evidence favorable to the Appellee, is required to review Appellee's testimony in that light, and is to draw all reasonable inferences favorable to the verdict. It is long standing law that a directed verdict is proper only when no issues of fact exist, and on appeal, the Court determines whether a

fact issue existed by examining the evidence in the light most favorable to Appellee and will affirm that there is substantial evidence to support the verdict. Petitioner seeks to invade the province of the jury by alleging that there was "undisputed evidence" as to damages. Respondents submit that damages were vehemently controverted at trial. The case law is clear that if there is any evidence in favor of a party against whom a directed verdict is sought, it is error for the Court to take the matter from the jury. Petitioner now states that the Court of Appeals based its decision on the erroneous premise that it failed to move for a directed verdict and that the Court of Appeals never reached the merits of Petitioner's Motion for Judgment Notwithstanding the Verdict.

Petitioner did not certify the portion of the transcript containing his oral Motion for Directed Verdict to the United States Court of Appeals and that issue is not presently before the Court. Even if the record had been fully abstracted, it is readily apparent that the trial court denied Petitioner's Motion for Directed Verdict at time of trial and that there was a sound basis for doing so.

Petitioner states that the damages question is one of law and due to the "undisputed facts" at trial, he was entitled to a directed verdict. To the contrary, this case stands for nothing more than a jury's assessment of damages to the only person they were asked to assess damages. At trial, there was testimony regarding both of the named insureds, Petitioner's and Joe Noga's contributions to the business, and the jury's assessment of damages cannot be attributed to simply real property. The question was whether there was substantial evidence to

support the jury's verdict for Petitioner which both the trial court and Court of Appeals concluded properly.

This is simply a case of a disappointed Plaintiff. Certiorari to review judgment should be granted only because of a federal question or the importance of a question involved, such as a conflict of opinion between the states, or issues of importance to the public as distinguished from that of a private party. *NLRB vs. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951). *Pflueger vs. Sherman*, 293 U.S. 55 (1934); *United States vs. Johnston*, 268 U.S. 220 (1925); *Fields vs. United States*, 205 U.S. 292 (1907). The Petitioner alleges that Writ of Certiorari should be granted to review the evidence and specific facts presented at the trial court. Respondents submit that this is not a proper matter for Writ of Certiorari in that a Motion for Directed Verdict and denial of a Motion for Judgment Notwithstanding the Verdict lies within the sound discretion of the trial court and is not a matter to be reversed on appeal absent a finding that the trial court abused its discretion in denying the Motion.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

*Mt. Hawley Insurance Company
and St. Katherine Insurance
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